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IN THE

Supreme Court of the United States

PIZZA HUT, INC.,

Petitioner,

v.

PAPA JOHN'S INTERNATIONAL, INC.;
PAPA JOHN'S USA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THOMAS C. MORRISON
PATTERSON, BELKNAP, WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036-6710
(212) 336-2650

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
LICHA M. NYIENDO
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ROBERT W. MILLEN
PIZZA HUT, INC.
14841 N. Dallas Parkway
Dallas, TX 75240
(972) 338-7661

Counsel for Petitioner

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* Counsel of Record

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INTRODUCTION

In this case, a jury found, and the district court and court of appeals affirmed, that respondent Papa John's misrepresented facts and deceived consumers by purporting to make empirical demonstrations of the superiority of the ingredients and taste of its pizza in a $300 million advertising campaign. Specifically, the jury and the courts below held that Papa John's sauce, dough and taste test claims were false and misleading and that, when combined with the "Better Ingredients. Better Pizza." slogan, the latter became false and misleading.[1] In a remarkable decision, however, the court of

[1] Papa John's tries to leave the impression that only the sauce, dough and taste test advertisements were found false and misleading, *see*

appeals vacated the jury verdict on the legal ground that the misrepresentations at issue were not "material" to a consumer's pizza-purchasing decision. In so doing, the court applied an actual-reliance test for materiality that plainly conflicts with the different formulations of materiality employed by other courts of appeals and by the Federal Trade Commission. The best evidence that this case creates a conflict is the simple truth that all other courts of appeals would presume that deceptive claims of superior taste and quality are "material" to the pizza-purchasing decisions of consumers absent some unimaginable evidence that consumers buying pizza are indifferent to these characteristics. No other court of appeals would have questioned the materiality of these misrepresentations in this context.

In addition, and contrary to Papa John's attempt to minimize the importance of the issue presented, the substantial practical implications of the error are evident. As advertising becomes an increasingly vital component of our national economy, it becomes correspondingly critical that "the stream of commercial information flow cleanly as well as freely." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976). The Lanham Act has become a national standard governing false advertising claims; and private enforcement of this provision, supplementing the FTC's enforcement of the FTC Act, is essential to effectuate the purposes of this important statutory prohibition. Conflict and uncertainty concerning the meaning and application of a critical element of such a cause

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Opposition ("Opp.") 6-7, suggesting that the "Better Ingredients. Better Pizza." slogan is not itself at issue. That is wrong. Papa John's ignores that the jury and the courts below found that the slogan was tainted by the false and misleading sauce, dough, and taste test advertisements and thus itself became false and misleading as of May 1997. *See* App. 22a-23a ("[w]hen used in the context of the sauce and dough ads, the slogan is misleading").

of action wastes judicial and private resources. In addition, false advertising cases under the Lanham Act have become an increasingly valuable tool in ensuring that national advertising campaigns are truthful and that the market is not skewed in favor of deceptive enterprises. The decision below, if left undisturbed, will undermine Congress' intent that private plaintiffs play a significant role in enforcing the prohibition against false advertising. Indeed, the actual reliance test is an unprecedented impediment to the prosecution of false advertising lawsuits, because as a practical matter actual reliance in the form of altered purchasing decisions sets up a prohibitively expensive hurdle for plaintiffs. In sum, the petition for certiorari should be granted.

I. THE FIFTH CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Papa John's observes that in the opinion in this case, the Fifth Circuit set out the five-element test for a violation of section 43(a) of the Lanham Act, and correctly quoted the predominate standard for determining the materiality of a false or deceptive claim – to wit, whether a deception is "likely to influence the consumer's purchasing decision." Opp. 10 (emphasis omitted). Based on this fact, Papa John's makes its primary argument in opposition to the petition – that so long as the Fifth Circuit in its opinion mouths the words of the correct standard, even at the most abstract level of inquiry, its decision does not create a conflict. See *id.* (claiming that the court "explicitly endorsed" the natural tendency test). That is not so. Where, as here, the test *used* by the court of appeals – actual reliance – conflicts with the actual test used by other courts of appeals, there is a conflict among these courts, whatever rote incantation of the elements of a cause of action appears at the commencement of the opinion.

Here, the Fifth Circuit, after reciting the natural tendency test, made clear – through the language it employed, the test it applied, and the result that it reached – that its standard was not, in fact, the "natural tendency to influence" test used by other courts, but rather an "actual reliance" test. The court of appeals explicitly stated that it was required to determine if "the slogan had the tendency to deceive consumers *so as to affect their purchasing decisions,*" App. 27a (emphasis supplied), and whether consumers "actually relied on the misrepresentations in making purchasing decisions," *id.* at 7a n.2. See also App. 27a (rejecting evidence of subjective intent of Papa John's executives, because it was not "evidence of *the fact that consumers in fact relied on the message to make their purchases*") (emphasis supplied). The court most definitely did not inquire whether misrepresentations about taste and quality would have a natural tendency to affect purchasing decisions. Instead, it addressed the record evidence, making clear that it would not find materiality absent *evidence* that consumers not only were deceived by the misrepresentations at issue, but also actually relied on the misrepresentations in making purchasing decisions. See, *e.g.*, *id.* at 26a (rejecting assertion that materiality could be supported by consumer survey that "showed that 48% of the respondents believe that 'Papa John's has better ingredients than other national pizza chains'" and by the evidence of the "subjective intent of Papa John's executives to 'create a perception that Papa John's in fact uses better ingredients'").

If the court had been using a natural tendency test without a gloss, it plainly would have found that any false or misleading advertising persuading consumers that Papa John's pizza has better ingredients and taste has a natural tendency to affect the pizza purchasing decision; no other result would have been conceivable. Pizza is a food product bought for its taste, a characteristic that is a function of the quality of its ingredients. Papa John's misrepresentations relate to these core product characteristics; the advertisements at issue

contain vivid images of Papa John's and Pizza Hut's ingredients, contrasting vine-ripened tomatoes with a viscous tomato paste and contrasting filtered water with tap water running into a dirty-looking sink. See App. 4a. The claim that these misrepresentations are not material is "pure fancy." Opp. 11. See, *e.g.*, *American Tel. & Tel. Co.* v. *Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1429 n.9 (3d Cir. 1994) (materiality inquiry is whether the misrepresentation is "likely to influence [the] purchasing decision"); *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*, 661 F.2d 272, 278 (2d Cir. 1998) (finding deceptive claims of a product's "competitive[] superior[ity]" material, as "representation[s] regarding [the product's inherent characteristics]"); *Novartis Corp.* v. *FTC*, 223 F.3d 783, 787 (D.C. 2000) (holding that efficacy is a "pivotal consideration" in a consumer's decision making process for analgesics and therefore that it is "common-sense" that claims of superior efficacy are material to a consumer's purchasing decisions). The court did not like the result below and so altered the materiality test in the only way that would allow it to vacate the jury verdict, an increasingly disturbing trend in Lanham Act false advertising cases. See Petition 19-20.

Papa John's reformulates Pizza Hut's argument as one that "actual reliance is never important." Opp. 12. Of course, that is not our position. Plainly, a plaintiff could prove materiality by presenting evidence of actual consumer reliance on the misrepresentation at issue. But the question presented here is whether a plaintiff *must* show actual reliance to prove materiality, and the answer to that question is clearly no. And, whether or not actual reliance may be required to show materiality in cases where "it is not plausible to infer the required influence from the fact of the challenged representation," *id.*, this plainly is not such a case. Representations about the ingredients and taste of pizza are presumptively material. Yet actual consumer reliance on the

proven misrepresentations is what the Fifth Circuit required of Pizza Hut.

Papa John's next insinuates that, although the FTC often employs presumptions of materiality, FTC Act cases are of no significance in assessing the conflict here because the materiality standard under the Lanham Act is more stringent. This argument too is wrong. The FTC's materiality test is the same as the materiality test used by all courts of appeals other than the Fifth Circuit. Compare *Novartis*, 223 F.3d at 786 ("a material claim is one that 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product'"), with *American Tel. & Tel. Co.*, 42 F.3d at 1429 n.9, and *Vidal Sassoon, Inc.*, 661 F.2d at 278. And although Papa John's cites *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990), for the proposition that standards under the FTC Act cannot be transposed onto the Lanham Act, Opp. 13, *Sandoz* holds only that the burden for proof of deception varies under the two Acts. We have found no suggestion in any case that the FTC standard for materiality does not track the standard under the Lanham Act law in any circuit except the Fifth Circuit. Under the Lanham Act, as under the FTC Act, materiality is presumed for misrepresentations, such as those at issue here, which on their face satisfy the natural tendency test, and FTC Act cases therefore conflict with the Fifth Circuit's actual reliance test for materiality.

Papa John's does not – and could not – take issue with the fact that an actual reliance test is at odds with the formulations of the materiality test adopted in all other courts of appeals and irreconcilable with the general approach to materiality set forth in this Court's recent decisions. See Petition 15-16 (citing cases). In other circuits, using varying formulations, the courts deem material a misrepresentation that has a natural tendency to affect purchasing decisions, and do not require evidence of its actual effect. The court of appeals decision in this case thus clearly creates a decisional

conflict. This Court should grant the petition to harmonize and unify the varying formulations of materiality utilized by courts deciding false advertising cases under the Lanham Act.

II. THE DECISION BELOW WAS WRONG AND IMPORTANT.

Papa John's argues that the court of appeals correctly held that the misrepresentations at issue were not material and further asserts that, indeed, the court could have ruled against Pizza Hut on the alternative ground that the advertisements were not deceptive.

Initially, Papa John's tries to leave the impression that Pizza Hut did not present any evidence relevant to materiality. This is wrong, and serves to illustrate our argument. Representations about the taste and quality of ingredients in pizza, if believed, have a natural tendency to affect consumer purchases about pizza. No proof that consumers actually made pizza purchases in reliance on these misrepresentations should have been required to support materiality, nor would such proof have been required by any other court of appeals. Equally to the point and contrary to Papa John's, this is an especially good case "in which to assume, without more, that the challenged statements would necessarily alter behavior in the marketplace." Opp. 15. The misrepresentations at issue do not concern matters of "subjective personal taste." *Id.* Instead, they make purported empirical, vivid demonstrations of the superiority of the two main components of pizza – the sauce and the dough – and based on those demonstrations assert that Papa John's ingredients and taste are superior. It may be presumed that false statements about taste and quality that deceive consumers affect those consumers' pizza purchasing decisions. Papa John's argument to the contrary is simply an argument that consumers were not truly deceived by their misrepresentations – a finding contrary to the jury verdict on this subject that was affirmed by the court of appeals. The evidence abundantly showed that consumers were deceived by the "empirical" demonstrations of superior

ingredients and taste and that Papa John's executives *intended* consumers to be deceived and to act upon their deception in making purchasing decisions. By holding that this was not sufficient evidence of materiality, the court revealed that it was using an actual reliance test. On any other standard – and certainly under the natural tendency standard – this evidence is more than sufficient to show the materiality of a misrepresentation and thus to mandate affirmance of a jury verdict on a Lanham Act false advertising claim.

Papa John's alternative attempt to show that the court of appeals could have reversed the jury and district court on the question of deception simply demonstrates its strong desire to divert this Court from the court of appeals' manifest error in the materiality analysis. Assuming *arguendo* that Pizza Hut did not prove actual falsehood – and we submit that, in combination with the misrepresentations about sauce, dough, and taste, the slogan "Better Ingredients. Better Pizza." is false – the jury plainly found, and the lower courts explicitly affirmed, that Papa John's misrepresentations actually deceived consumers. See App. 6a-7a.

Papa John's third attempt to show that the decision below was correct is, in fact, a disguised defense of the actual reliance standard. It states that "petitioner is not entitled to obtain relief, even injunctive relief, based merely upon speculation about the possible impact of the statements on potential consumers." Opp. 17. But the natural tendency standard is not legalized speculation. It simply recognizes that certain misrepresentations – such as the representations at issue here – are virtually certain to have an impact on consumer purchases. The citation of *Sandoz* (*id.*) in support of Papa John's argument is uniquely inapt. In that case, the court required a Lanham Act plaintiff to show how consumers "actually do react" to prove deception, not materiality. See *Sandoz*, 902 F.2d at 229 (emphasis omitted). And Pizza Hut supplied substantial evidence of deception here, as was affirmed by a jury and both lower courts. Pizza

Hut is relying not on speculation, but on evidence that consumers were deceived by advertisements making false representations about characteristics central to a consumer's purchasing decision.

Last, Papa John's argues that this case, even if wrongly decided, is not worthy of the Court's attention because it does not present a recurring or generally important question. That is not so. The case presents a widespread issue that is causing definitional problems for the lower courts, and is increasingly problematic in light of the rapid growth in the number of false advertising cases. See Petition 19-20.[2] The lower courts may repeat the mantra of the multi-part test for materiality, but the meaning of this requirement (*i.e.*, the precise nature of the hurdle that it presents to plaintiffs) is uncertain, and courts lack a genuine understanding of the requirement in the Lanham Act context. Now that private litigation in the federal courts determines the singular standard for assessing false advertising claims, it is more important than ever for this Court to guide the lower courts and to ensure uniform application of this important federal law.

Two decades of Lanham Act jurisprudence have established a framework wherein national advertisers are well aware that advertising that is unsubstantiated or that makes unsupportable claims will be enjoined. In no Lanham Act case has a court *ever* exonerated an advertiser guilty of false comparative advertising on the ground that the plaintiff failed to prove that the false advertising was not material to consumers. By its decision, the Fifth Circuit has opened a gaping hole in the fabric of the national law preventing deceptive advertising: unless competitors prove empirically

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[2] Papa John's specific contention that only three of the Lanham Act cases cited in the petition address the merits of the materiality issue, for example, is simply wrong. The petition cites no fewer than 17 cases that illustrate the varying ways in which the lower courts have applied the materiality standards to specific facts. *See* Petition 13-17, 19-22.

that the false advertising at issue actually caused consumers to change their purchasing decisions, it may not be enjoined. This will impose a major impediment to the prosecution of Lanham Act lawsuits, and accordingly, will frustrate the congressional intent of encouraging private plaintiffs to incur the burdens of ensuring that the marketplace is free of false advertising.

For all of these reasons, this Court should grant the petition and resolve the conflict on this important, recurring question of federal law.

CONCLUSION

For these reasons and the reasons set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

THOMAS C. MORRISON
PATTERSON, BELKNAP, WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036-6710
(212) 336-2650

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
LICHA M. NYIENDO
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

ROBERT W. MILLEN
PIZZA HUT, INC.
14841 N. Dallas Parkway
Dallas, TX 75240
(972) 338-7661

Counsel for Petitioner

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* Counsel of Record